No. 47831-5-II

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

SHERRY L. ESCH,

Appellant,

v.

SKAMANIA COUNTY PUBLIC UTIILTY DISTRICT #1; and CLYDE D. LEACH, in his capacity as Public Utility District Commissioner,

Respondents.

BRIEF OF RESPONDENT DR. CLYDE D. LEACH

Matthew J. Segal, WSBA #29797

PACIFICA LAW GROUP LLP
1191 Second Avenue, Suite 2000
Seattle, WA 98101-3404
(206) 245-1700

Attorneys for Respondent Dr. Clyde D. Leach

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Washington Cases

Federal Cases

Constitutional Provisions

Washington Statutes

Rules

Other Authorities

I. INTRODUCTION

This appeal arises from a public records request ("PRA Request")[1] made to the Skamania County Public Utility District No. 1 ("PUD") by Appellant Sherry Esch, the wife of one of the PUD's commissioners Curt Esch. Respondent Dr. Clyde D. Leach is a retired commissioner of the PUD, who Appellant has named as an additional individual defendant in her suit against the PUD relating to her PRA Request. The trial court dismissed Dr. Leach from the lawsuit, which otherwise remains pending against the PUD. Appellant sought immediate review of the dismissal of Dr. Leach, which is the sole issue in this appeal.

This appeal should be dismissed because it is now moot. In her Opening Brief, Appellant asked this Court to compel Dr. Leach to comply with a purported settlement agreement, require him to conduct a supplemental search of his wife's computer hard drive, and produce any additional public records located on that hard drive. Alternatively, Appellant argued that virtually identical relief should be ordered pursuant to the Supreme Court's recent decision in *Nissen v. Pierce Cty.*, 183 Wn.2d 863, 887, 357 P.3d 45 (2015). Although Dr. Leach never agreed to the terms of the proposed settlement, he has nonetheless voluntarily allowed a third party search of his wife's hard drive (with her consent),

[1] The request was made under Washington's Public Records Act, ch. 42.56 RCW.

and turned over all documents located on the hard drive located pursuant to search terms provided by the requester Ms. Esch (regardless of whether they are public records). As a result, there is no further relief that can be awarded in this appeal.

Alternatively, this Court should affirm the trial court's order dismissing Dr. Leach on the basis that there is no cause of action under the Public Records Act, ch. 42.56 RCW, against a retired commissioner of a Public Utility District. The PRA statute governing judicial review allows for action against an agency but not its individual elected officials or employees.

Finally, even if this Court concludes this appeal is not moot, and finds a direct cause of action against Dr. Leach, it should still affirm the trial court. The trial court correctly declined to enforce a purported settlement when the material terms were not agreed upon. The trial court's decision is also consistent with the Supreme Court's decision in *Nissen*, as it recognizes that a compelled third-party search of a personal computer would infringe on the constitutional rights of Dr. Leach. *Nissen* balanced these interests by allowing an individual employee or official to conduct a search and produce records found in that search, which is what Dr. Leach has done. The trial court's dismissal of Dr. Leach on the basis that no relief could be directed against him was correct and should stand

under *Nissen*.

II. COUNTER-STATEMENT OF ISSUES

A. Whether this appeal should be dismissed as moot because Dr. Leach has allowed a third party search of his wife's hard drive and turned over all records located therein, Appellant agrees that the issue of the parties' alleged settlement agreement is now moot, and Appellant concedes in her brief that Dr. Leach's compliance moots any remaining issues on appeal.

B. In the alternative, whether the trial court properly declined to enforce a purported settlement against Dr. Leach where the material terms were disputed.

C. In the alternative, whether the trial court should be affirmed on the ground that there is no individual cause of action against Dr. Leach.

D. In the alternative, whether the trial court should be affirmed because its decision not to order a compelled third-party search of a private hard drive is consistent with the Supreme Court's decision in *Nissen*.

E. Whether this Court should decline to award attorney's fees because Appellant should not prevail on appeal, and because there is no basis for a fee award against a former PUD commissioner.

III. COUNTER-STATEMENT OF THE CASE

Dr. Leach served as a commissioner of the PUD from 1996 through 2014. CP 93. Dr. Leach is also a retired dentist and professor, and at the time of his retirement was an Assistant Dean of the School of Dentistry at the University of Southern California. CP 93-94.

In April 2012, Ms. Esch made a public records request to the PUD, seeking among other broad categories of records, all communications sent from Leach's private email account between Dr. Leach and Ms. Esch's husband's former political opponent. CP 97-98. Ms. Esch also sought a compelled third-party search of Dr. Leach's hard drive. *Id.* As the PUD later stated to the trial court, there was "a real risk that based on these terms, the search would capture correspondence between Commissioner Leach and his constituents, as well as correspondence related to Commissioner Leach' s political and campaign- related activities." CP 179-180. In fact, the exemplar document attached to Ms. Esch's request was a communication from Dr. Leach (sent on his personal email) to his local constituents. CP 99.

Dr. Leach became aware of the request in May 2012, and made repeated efforts to honor the requests of PUD staff seeking specified records from his and his wife's home computer, including providing hundreds of pages of email communications responsive to Ms. Esch's

search terms. *See* CP 94-95. The ability to recover records from Dr. Leach's computer was limited because it had crashed in 2011 (i.e., before the request had been made). CP 95. Following the crash Dr. Leach had used his wife Connie's computer. *See* CP 94-95.

In August 2013, Ms. Esch brought suit against the PUD and Dr. Leach individually. CP 1- 35. Dr. Leach moved to be dismissed from the action on the grounds that he was not a proper defendant under the Public Records Act. CP 38-60. The trial court initially denied this motion, reserving the question of whether it could order a compelled third-party search of Mrs. Leach's hard drive, as Ms. Esch had requested. *See* CP 1584. Following discovery, all parties (Dr. Leach, the PUD, Leach and Ms. Esch) then moved for summary judgment, with Dr. Leach renewing his request to be dismissed as a party. CP 105-129, 175-245, 246-282.

With dispositive motions pending, the PUD and Ms. Esch agreed to an attempted mediation of the case. *See* CP 1505-1506. Dr. Leach had no role in the selection of the mediator, nor was he even asked directly to be a participant in the mediation. *Id.* He and his wife attended because their counsel, Brian Wolfe, believed that Ms. Esch and the PUD would not even attempt a mediation if Dr. Leach did not agree to attend. *See* CP 1543-44, 1555-56. Dr. Leach and his wife spent a long and tiring day at the mediation, staying in a conference room from 9 until they were moved

at approximately 11:00 into a separate room by themselves until 6:15 in the evening, after which they left before the mediation concluded. CP 1544.

As Mr. Wolfe testified, Dr. Leach "was firm" that he would only consider settlement proposals in writing. CP 1557. Ms. Esch's counsel Bradley Andersen asked Mr. Wolfe to send him an email the next day to capture their ongoing discussions, which resulted in an email from Mr. Wolfe email on May 21, 2015. CP 1544-45. The email contained a discussion of general terms but was never intended as a binding agreement, nor could it have been because Mr. Wolfe did not have Dr. Leach's authority to finalize a settlement. CP 1557. Moreover, when the parties later attempted to agree on a form of settlement agreement, they could not do so. CP 1557-58. In fact, the settlement agreement proposed by Ms. Esch differed materially from Mr. Wolfe's earlier email. *See id.*

When Ms. Esch and Dr. Leach could not agree on the terms of a settlement agreement, Ms. Esch moved to "enforce" a purported agreement in principle based on the parties exchange of settlement communications. CP 1466-67. The trial court denied the motion to enforce, finding that there were "substantial, significant and material differences between the two [settlement proposal] documents to which Defendant Clyde D. Leach never agreed...." CP 1575.

The trial court then also denied the PUD's and Ms. Esch's motions, but granted Dr. Leach's motion and dismissed him from the case. The trial court dismissed Dr. Leach because "the PRA does not currently give the Court the authority to order a third party to look into an official's private home computer." CP 1584. Judgment was entered and the issue of Dr. Leach's dismissal was certified as final under CR 54(b). CP 1577-78. This appeal followed.

IV. ARGUMENT

The trial court granted summary judgment in favor of Dr. Leach and dismissed him from this action. Review of a grant of summary judgment under the Public Records Act is de novo. *See, e.g., Sanders v. State*, 169 Wn.2d 827, 845, 240 P.3d 120 (2010). Review of a decision to enforce a settlement agreement is also de novo. *Cruz v. Chavez*, 186 Wn. App. 913, 920, 347 P.3d 912 (2015).

A. Motion to Dismiss Appeal as Moot

At the outset, Dr. Leach moves to dismiss the remainder of this appeal as moot.[2] "A case is moot where 'a court can no longer provide effective relief.'" *Westerman v. Cary*, 125 Wn.2d 277, 286, 892 P.2d 1067, 1072 (1994) (quoting *Orwick v. Seattle,* 103 Wn.2d 249, 253, 692

[2] See RAP 17.4(d): "A party may include in a brief only a motion which, if granted, would preclude hearing the case on the merits." Granting of this motion would preclude hearing the appeal on the merits.

P.2d 793 (1984)). And while courts may elect to retain and decide moot issues where "matters of continuing and substantial public interest are involved", there must also be "genuine adverseness" in order to invoke this exception. *Westerman*, 125 Wn.2d at 286 (citing *Sorenson v. Bellingham,* 80 Wn.2d 547, 558, 496 P.2d 512 (1972); *Hart v. Department of Social & Health Servs.,* 111 Wn.2d 445, 448, 759 P.2d 1206 (1988)). Thus, moot cases may only be retained for decision where "a hearing on the merits has occurred", which is not the case here. *Westerman*, 125 Wn.2d at 286.

Appellants have acknowledged that the bulk of this appeal, pertaining to enforcement of an alleged settlement agreement, is moot because Dr. Leach has already voluntarily complied with the obligations appellants seek to impose through enforcement of the settlement. Specifically, Dr. Leach has allowed a third party to conduct an additional search of his wife's hard drive using the search terms identified by Appellant, has turned over all the documents located in the supplemental search (even though he continues to believe they do not constitute public records), and has provided detailed, non-conclusory testimony in support of the search and production. *See* Decl. of Matthew J. Segal in Support of Motion to Dismiss Appeal as Moot & Ex. A.

In other words, Dr. Leach has met and exceeded the requirements

Appellant claims comprise her settlement agreement with Dr. Leach. *See* Br. of App't at 10; CP 1469. Dr. Leach has also met and exceeded the requirements to search for records in his custody as recently laid out by the Supreme Court in *Nissen v. Pierce Cty.*, 183 Wn.2d 863, 887, 357 P.3d 45, 57 (2015). Specifically, Dr. Leach has allowed a third party to conduct a search of wife's hard drive, and he has not withheld any of the records located. In fact, the relief requested by Appellant in her opening brief was essentially a directive that Dr. Leach comply with *Nissen*, Br. of App't at 21-22, which he has done.

In light of the above, Appellant has stated she will seek to withdraw the portions of the appeal pertaining to the settlement agreement, leaving only her constitutional argument. *See* Segal Decl., Exs. B, C at p. 2.[3] In her Opening Brief, Appellant conceded that compliance with the alleged settlement agreement would moot these remaining constitutional arguments. *See* Br. of App't at 2, n. 3 ("Although Esch has organized the public records argument first, the Court's resolution of the parties' settlement agreement issue should render the constitutionality of the PRA issue moot.") (citing *State v. Hall*, 95 Wn.2d

[3] "As her first assignment of error, Esch claimed that the trial court failed to enforce the terms of a settlement agreement between Esch and the Respondent, Clyde Leach. After Esch filed her Opening Brief, Leach substantially complied with at least portions of the settlement agreement, thereby rendering that issue moot on appeal."

536, 539, 627 P.2d 101, 103 (1981) ("A reviewing court should not pass on constitutional issues unless absolutely necessary to the determination of the case."); *In re Impoundment of Chevrolet Truck, WA License No.A00125A ex rel. Registered/Legal Owner*, 148 Wn.2d 145, 160, 60 P.3d 53, 62 (2002)); *see also* App's Br. at 18.

Dr. Leach agrees that this appeal is now moot in its entirety. Specifically, there is no further relief to be ordered against Dr. Leach as he has already voluntarily complied with the obligations Appellant seeks to impose on him. Moreover, there is no need for this Court to decide whether Dr. Leach may withhold records on constitutional grounds, as Dr. Leach is not withholding any records on any grounds.

In sum, the Court should dismiss this appeal as moot. In the event it finds all or part of the appeal is not moot, however, this Court should then affirm the trial court.

B. Even if Compliance with the Purported Settlement Agreement Were Not a Moot Issue, the Trial Court Properly Denied the Motion to Enforce.

The trial court properly declined to enforce a settlement against Dr. Leach where the material terms of the agreement were never agreed upon. Civil Rule 2A "applies to preclude enforcement of an agreement when "(1) the agreement was made by the parties or attorneys 'in respect to the proceedings in a cause[,]' and (2) the purport of the agreement is

disputed." *Cruz v. Chavez*, 186 Wn. App. 913, 919, 347 P.3d 912 (2015) (citing *In re Patterson,* 93 Wn. App. 579, 582, 969 P.2d 1106 (1999); *In re Marriage of Ferree,* 71 Wn. App. 35, 39, 856 P.2d 706 (1993)).[4]

Where, as here, a CR 2A motion is based on affidavits, the rules for summary judgment apply. As a result, all facts must be construed in favor of the non-moving party, and the motion must be denied in the face of any disputed material facts. *Cruz*, 186 Wn. App. at 920.

At most, the record below shows that counsel for Ms. Esch and counsel for Dr. Leach discussed a potential settlement proposal but did not sign a mutually agreed writing reflecting any agreement. By its terms, CR 2A does not authorize the enforcement of oral settlement agreements absent mutual assent in writing. Mr. Wolfe's email the day after the mediation contained "[t]he general provisions that were discussed... but there was never an 'agreement' by Dr. Leach." CP 1557. Furthermore, when comparing Mr. Wolfe's email of May 21 and Mr. Andersen's proposed agreement of May 26, there is not an evident meeting of the minds. *Compare* CP 1475 *with* CP 1480-88. Mr. Wolfe and Mr.

---

[4] CR 2A provides: "No agreement or consent between parties or attorneys in respect to the proceedings in a cause, the purport of which is disputed, will be regarded by the court unless the same shall have been made and assented to in open court on the record, or entered in the minutes, or unless the evidence thereof shall be in writing and subscribed by the attorneys denying the same."

Andersen exchanged further edits of these documents but never reached a final agreement. *See* CP 1496; 1507-08. At the very least, the differences in the documents themselves along with the testimony of Dr. Leach and Mr. Wolfe (CP 1505-15, 1543-65) raised disputed issues of material fact precluding the granting of a motion to enforce.

Once again, Dr. Leach has already voluntarily met and exceeded the principal provisions of the purported settlement, rendering this issue moot. If this Court determines it is not moot, however, then it should affirm the trial court's denial of Appellant's motion to enforce.

C. There is no Cause of Action Against Dr. Leach.

As noted above, this appeal pertains only to claims directly against Dr. Leach, and not to claims against the PUD. The trial court allowed this appeal to proceed under CR 54(b) independent of remaining claims against the PUD. *See* CP 1577-78. As a result, the question of whether the PUD has complied with the Public Records Act remains before the trial court and is not at issue here. This Court should, therefore, alternatively affirm the trial court on the ground that the Public Records Act provides no individual cause of action against Dr. Leach, a retired PUD Commissioner.[5]

[5] This Court may affirm based on any grounds argued to the trial court. RAP 9.12. The parties argued below that Dr. Leach was not a proper

The right to judicial review under the Public Records Act is governed by RCW 42.56.550, which provides in relevant part as follows:

> (1) Upon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, the superior court in the county in which a record is maintained may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records....
> ****
> (2) Upon the motion of any person who believes that an agency has not made a reasonable estimate of the time that the agency requires to respond to a public record request, the superior court in the county in which a record is maintained may require the responsible agency to show that the estimate it provided is reasonable....

(Emphasis added). Appellant relied on this statute as her basis for relief. CP 1.

Under the plain language of this statute, the relief a court may order is limited to a show cause order against the agency defendant for either refusing to allow inspection and copying of public records, or failing to provide a reasonable estimate of time to respond to a public records request. *Id.*; *West v. Washington State Ass'n of Dist. & Mun. Court Judges*, _ Wn. App. _, 361 P.3d 210, 212-13 (2015) ("Under Washington's Public Records Act, an 'agency' shall, upon request for identifiable public records, 'make them promptly available to any person.'

---

defendant under the Public Records Act and should be dismissed on that basis. *See* CP 41.

The act applies only to the records of an 'agency' as defined by the act.")(citing RCW 42.56.080; *Yakima v. Yakima Herald–Republic,* 170 Wn.2d 775, 792, 246 P.3d 768 (2011)).

> Agency is defined under the Public Records Act as follows:
>
> "Agency" includes all state agencies and all local agencies. "State agency" includes every state office, department, division, bureau, board, commission, or other state agency. "Local agency" includes every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency.

RCW 42.56.010.

Dr. Leach is not an "agency" under this definition, nor does Appellant contend that he is an "agency". Because he is not an "agency", the trial court correctly concluded there was no relief that could be granted against Dr. Leach. To be clear, the question of whether any relief may be granted against the PUD remains a live issue in the trial court, but resolution of that question does not justify Dr. Leach's continued presence as an individual defendant in this case. On this ground alone, the trial court's dismissal of Dr. Leach may be affirmed.[6]

[6] Dr. Leach also joins and incorporates the additional arguments on this issue made in the PUD's brief. *See* RAP 10.1(g).

D. Alternatively, the Trial Court Should be Affirmed as Consistent with *Nissen*.

Even if this Court concludes that this appeal is not moot, and finds a cause of action directly against Dr. Leach, the trial court's dismissal of Dr. Leach should be affirmed as consistent with the Supreme Court's decision in *Nissen*.

Contrary to Appellant's position, *Nissen* held that "the public's statutory right to public records does not extinguish an individual's constitutional rights in private information." *Nissen*, 183 Wn.2d at 884. To balance the rights of the public with those of a public servant, *Nissen* establishes the "mechanics" of "searching for and obtaining public records stored by or in the control of an employee." *Id.* at 883. It does so by allowing "employees in good faith to submit 'reasonably detailed, nonconclusory affidavits' attesting to the nature and extent of their search." *Id.* at 885. "The agency then proceeds just as it would when responding to a request for public records in the agency's possession by reviewing each record, determining if some or all of the record is exempted from production, and disclosing the record to the requester. *Id.* at 886 (citing *Resident Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, 436–37, 327 P.3d 600 (2013)).

The trial court's ruling is consistent with *Nissen*. The trial court

did not rule that none of the records on Mrs. Leach's hard drive could be public records. To the contrary, the trial court adopted and followed the Court of Appeals' decision in *Nissen* (the operative decision at the time) and concluded that such documents could be public records. CP 1583 (citing *Nissen v. Pierce Cty.*, 183 Wn. App. 581, 333 P.3d 577 (2014) *review granted*, 182 Wn.2d 1008, 343 P.3d 759 (2015) *and aff'd in part, rev'd in part*, 183 Wn.2d 863, 357 P.3d 45 (2015)). The trial court also correctly declined to order a compelled search of Mrs. Leach's hard drive, stating that "the PRA does not currently give the Court authority to order a third party to look into an official's private home computer." CP 1584. Appellant makes much of the trial court's statement that "[t]he constitutional protections or the right to privacy in this state and in the federal constitution trump the PRA." *See id.* In reviewing the trial court's order as a whole, however, it is clear this statement refers to the constitutional protections against a compelled and unfettered third-party search of Mrs. Leach's hard drive. Moreover, in the next sentence, the court states that "these are questions for another day...." *Id.*

Although the day has not arrived where the Court must resolve these questions, the trial court was correct that a compelled third-party search of Mrs. Leach's hard drive would be unconstitutional. The Fourth Amendment assures that "[t]he right of the people to be secure in their

persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause...." "[I]ndividuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer." *City of Ontario, Cal. v. Quon*, 560 U.S. 746, 756, 130 S. Ct. 2619, 2628, 177 L. Ed. 2d 216 (2010). Article I, section 7 of the Washington Constitution provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." And "[i]t is by now axiomatic that article I, section 7 provides greater protection to an individual's right of privacy than that guaranteed by the Fourth Amendment." *State v. Parker*, 139 Wn.2d 486, 493, 987 P.2d 73 (1999).[7]

Article I, section 7 "differs from the Fourth Amendment in that article I, section 7 'clearly recognizes an individual's right to privacy with no express limitations.'" *Parker*, 139 Wn.2d at 493 (quoting *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982)). The home, in particular, "is a 'highly private place' and 'receives heightened constitutional protection.'" *State v. Johnson*, 104 Wn. App. 409, 415, 16 P.3d 680

[7] "Article 1, section 7 provides greater protection of personal privacy rights than the Fourth Amendment. An analysis under *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986) is not necessary on this issue." *State v. Vickers*, 148 Wn.2d 91, 109, 59 P.3d 58 (2002) (internal citations omitted).

(2009) (quoting *State v. Young*, 123 Wn.2d 173, 185, 867 P.2d 593 (1994)).

In *State v. Nordlund*, 113 Wn. App. 171, 181-82, 53 P.3d 520 (2002), this Court recognized that a personal computer is "the modern day repository of a man's records, reflections, and conversations." *Id.*; *see also Nissen*, 183 Wn.2d at 883 (noting that "today's mobile devices often contain "a 'wealth of detail about [a person's] familial, political, professional, religious, and sexual associations.'" (quoting *State v. Hinton*, 179 Wn.2d 862, 869, 319 P.3d 9 (2014) (alteration in original) (quoting *United States v. Jones*, ___ U.S. ___, 132 S. Ct. 945, 955, 181 L. Ed. 2d 911 (2012) (Sotomayor, J., concurring))).

"Thus, the search of [a] computer has first amendment implications that may collide with Fourth Amendment concerns. When this occurs, we closely scrutinize compliance with the particularity and probable cause requirements [of the Fourth Amendment]." *Nordlund*, 113 Wn. App at 182 (citing *Zurcher v. Stanford Daily*, 436 U.S. 547, 564, 98 S. Ct. 1970, 56 L. Ed. 2d 525 (1978); *Stanford v. Texas*, 379 U.S. 476, 485, 85 S. Ct. 506, 13 L. Ed. 2d 431 (1965); *State v. Perrone*, 119 Wn.2d 538, 547, 834 P.2d 611 (1992)).[8]

[8] Indeed, the First Amendment interests are heightened in the present case because Dr. Leach was an elected official. *Eugster v. City of Spokane*,

The *Nordlund* Court held that the search of a personal computer was unconstitutional because the search warrant was supported by only generalized statements. *Nordlund*, 113 Wn. App. at 181. Under the "scrupulous scrutiny" afforded to the search of a home computer, the affidavits failed to establish the requisite probable cause. *Id.* at 182: "Although the affidavits establish the presence of a computer in Nordlund's home and his non-criminal use of that computer, they do not contain particularized information demonstrating the required nexus between the computer and the possible evidence of the crimes under investigation." *Id.*[9] Here, there is no warrant at all, and the search requested by Ms. Esch suffers from further deficiencies, in that it would

---

121 Wn. App. 799, 807, 91 P.3d 117, 121 (2004) ("The First Amendment protects, among other rights, an individual's right to free speech and political association.") (citing *Fed. Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 440, 121 S. Ct. 2351, 150 L. Ed. 2d 461 (2001)).

[9] While this is not a criminal case, government-sanctioned searches outside the criminal context still implicate the Fourth Amendment and Article I, section 7. *See Steele v. State ex rel. Gorton*, 85 Wn.2d 585, 593-94, 537 P.2d 782 (1975) (citing *Oklahoma Press Publ'g Co. v. Walling*, 327 U.S. 186, 208, 66 S. Ct. 494, 90 L. Ed. 614 (1946) ("The gist of the protection sought is in the requirement, expressed in terms, that the disclosure shall not be unreasonable."); *City of Ontario, Cal. v. Quon*, 560 U.S. 746, 756, 130 S. Ct. 2619, 2627, 177 L. Ed. 2d 216 (2010) ("The Fourth Amendment applies as well when the Government acts in its capacity as an employer."); Ronald F. Wright, *The Civil and Criminal Methodologies of the Fourth Amendment*, 93 Yale L.J. 1127 (1984) (when applied in civil cases, Fourth Amendment test is one of reasonableness) (compiling cases).

sweep across private records (including political and constituent communications from an elected official) outside the scope of the Public Records Act.

Because a government-sanctioned invasion into Mrs. Leach's hard drive would constitute a search, it must "be conducted pursuant to constitutionally sufficient authority of law—that is, a valid warrant or the common law; a statute or ordinance that authorizes an unconstitutional search does not satisfy the 'authority of law' requirement." *Robinson v. City of Seattle*, 102 Wn. App. 795, 812-13, 10 P.3d 452 (2000).

Appellant points to no "authority of law" that would sanction a compelled third-party search. In fact, the only authority Appellant cites in her brief in support of her constitutional argument is *Nissen* itself. As discussed above, *Nissen* does not authorize compelled third-party searches, but instead strikes a balance that allows a public official to search his or her own records and support the search with a non-conclusory affidavit. The trial court was correct that nothing in the Public Records Act otherwise authorizes a compelled third-party search. The trial court's order should be affirmed on this additional ground.

E. There is No Basis to Award Fees Against Dr. Leach.

It is unclear from the request in Appellant's Brief to whom their fee request is directed. While there is no basis to award fees at all in this appeal, there is no legal ground for any fee claim against Dr. Leach individually.

Appellant seeks attorney's fees under RCW 42.56.550, which provides in relevant part:

> Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action.

RCW 42.56.550(d)(emphasis added); *see also Neighborhood All. of Spokane Cty. v. Cty. of Spokane*, 172 Wn.2d 702, 725, 261 P.3d 119, 131 (2011) (stating that "a party prevailing against an agency in a PRA action may be awarded costs and attorney fees....)(emphasis added).

As noted *supra*, Dr. Leach is not "an agency" under the Public Records Act. In the related context of injunction proceedings under RCW 42.56.540, the courts have prohibited fee awards against individuals unsuccessfully moving to preclude disclosure. These rulings are based on the fact that an individual is not an "agency" and fees may only be awarded against an agency. *See, e.g., Belo Mgmt. Servs., Inc. v. ClickA Network*, 184 Wn. App. 649, 663, 343 P.3d 370 (2014) (citing

Confederated Tribes of Chehalis Reservation v. Johnson, 135 Wn.2d 734, 757, 958 P.2d 260 (1998)).

Because he is not an "agency", there is no statutory basis to award fees against Dr. Leach under RCW 42.56.550, and no other basis for fees is cited. Under Washington law, any "litigation expenses"—including attorney fees in particular—"are not recoverable absent specific statutory authority, contractual provision, or recognized grounds in equity." *Wagner v. Foote*, 128 Wn.2d 408, 416, 908 P.2d 884 (1996). Because no such grounds exist here, any request for fees against Dr. Leach should be denied.

V. CONCLUSION

Dr. Leach respectfully requests that this appeal be dismissed in its entirety as moot. In the alternative, Dr. Leach requests that the trial court's order be affirmed because there was no enforceable settlement against Dr. Leach; there is no individual cause of action against Dr. Leach under the Public Records Act, and the trial court's order is consistent with the Supreme Court's directive in the *Nissen* decision.

RESPECTFULLY SUBMITTED this 8th day of February, 2016.

PACIFICA LAW GROUP LLP

By: _____
Matthew J. Segal, WSBA #29797
Attorneys for Respondent Dr. Clyde D. Leach

COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION II

SHERRY L. ESCH, Appellant, v. SKAMANIA COUNTY PUBLIC UTILITY DISTRICT #1; and CLYDE D. LEACH, in his capacity as Public Utility District Commissioner, Respondents.	No. 47831-5-II DECLARATION OF MATTHEW J. SEGAL IN SUPPORT OF MOTION TO DISMISS APPEAL AS MOOT

1. I am a partner at Pacifica Law Group, LLP, counsel of record for Respondent Dr. Clyde D. Leach ("Leach") in this case. I am over the age of 18, am competent to testify, and offer this declaration based on my personal knowledge. This declaration is submitted solely in support of Respondent Dr. Clyde D. Leach's Motion to Dismiss Appeal as Moot, contained in Dr. Leach's brief at pages 7-10.

2. Attached as **Exhibit A** is a true and correct copy of a declaration prepared by Dr. Leach that I provided to Ramsey Ramerman, counsel for the Skamania County Public Utility District No. 1 on

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2000
SEATTLE, WASHINGTON 98101-3404
TELEPHONE (206) 245 1700
FACSIMILE (206) 245.17500

December 7, 2015. On that same date, all additional documents located in the supplemental search described in Dr. Leach's declaration were provided to Mr. Ramerman.

3. Attached as **Exhibit B** is a true and correct copy of an email from Ms. Esch's counsel Philip Haberthur dated February 4, 2016, relating to the mootness of assignment of error 1, issue 1, and argument section B of the pending appeal.

4. Attached as **Exhibit C** is a true and correct copy of Appellant's motion to amend brief provided by Mr. Haberthur on February 4, 2016, and also relating to the mootness of assignment of error 1, issue 1, and argument section B of the pending appeal.

I declare under penalty of perjury that the foregoing is true and correct.

DATED this 8th day of February, 2016, signed in Seattle, Washington.

Matthew J. Segal

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2000
SEATTLE, WASHINGTON 98101-3404
TELEPHONE (206) 245 1700
FACSIMILE (206) 245.17500

EXHIBIT A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SKAMANIA

SHERRY L. ESCH,

Plaintiff,

v.

SKAMANIA COUNTY PUBLIC UTILITY DISTRICT #1 and CLYDE D. LEACH, in his capacity as Public Utility District Commissioner,

Defendants.

No. 13-2-00109-0

DECLARATION OF DR. CLYDE D. LEACH

I, Clyde D. Leach, under oath, do hereby depose and say as follows:

1. I am a dismissed defendant in the above action. I am over the age of 18 and competent to testify in this matter.

2. I served as an appointed and then elected Commissioner for Public Utility District No 1.of Skamania County ("the PUD") from April 1996 through December 2014. I choose not to run for re-election in November 2014.

3. I received a letter from the PUD asking me to conduct an additional search of my personal computer and email account in response to a public records request from Sherry Esch (filed with the PUD on April 30, 2012). A copy of the PUD's letter is attached as Exhibit A.

4. As to the number and type of computers at issue, I refer to Defendant Leach's answers to the FIRST SET OF INTERROGATORIES and request for production to plaintiff (case # 13-2-00109-0), Answer to Interrogatory # 4, which addresses this question in full. A copy of the same is attached as Exhibit B.

5. During the period relevant to this request I had a personal email account clydeleach@embarqmail.com, which was abandoned and replaced with 1cch2o@embarqmail.com. Please refer again to Exhibit B, Answer to Interrogatory # 4.

6. As a result of my computer crash in July 2011 and Embarq's one-year retention policy, the only records that might be responsive would be those created since July 2011 after I began using my wife's MAC BOOK computer.

7. I did not use my wife's computer for PUD business except to access emails.

I used the Embarqmail.com account to communicate with my constituents and conduct personal political activities.

8. In response to the new letter from the PUD, I again searched all my files, not just email files, using the same search criteria identified in the public records request.

9. The following methods were used in the attempt to gather any files that were possibly responsive to Mrs. Esch's request and that had not already been produced:

A. I performed a finder search, including verification of the creation date, of all files using the 32 key words or phrases as stated in Mrs. Esch's April 30, 2012 request (the second search). In the same manner, I had searched my records in June 2012 (the first search), which produced 660 pages of records that were previously provided to Mrs. Esch and her attorneys. The PUD and their attorneys have these documents as well. This finder search did not locate any records that were not previously located.

B. I performed a Mac-assisted Spot Light search. This came up with the same negative results (a third search).

C. I paid an IT expert (reimbursed by the PUD) to do a complete forensic search (a fourth search) using the same set of criteria supplied by Mrs. Esch. This search was several layers deep, and was it was also unable to find any new records. It was conducted searching all my files, and it took the expert two weeks to complete. The report from the IT person is attached as Exhibit C, and it explains that his attempt failed.

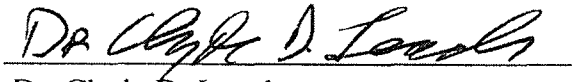
10. No files in response to Mrs. Esch's request were found in any of the above searches. All records found were dated after the April 30, 2012 date as determined by the public records request. Metadata was accessed through the search step called "info", and all dates were verified as created after the request date. Most of these files are in "sent communications" and parts of legal documents. None of these met the parameters of Mrs. Esch's public records request.

11. Another IT person was hired by the PUD and conducted an additional five hour forensic search on October 22, 2015 (fifth search). His report is attached as Exhibit D. This search discovered a few additional files. I decided to provide copies of these files to the PUD regardless of whether they are public records. A flash drive with those files in "native format" is being provided to the PUD.

12. Based on all of the above efforts including two, independent, searches conducted by third parties, there are no additional public records on my wife's MAC BOOK computer that are accessible. I have performed a more than "adequate search" both now and in June 2012, and report my effort by submitting this affidavit in good faith.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 4th day of December, 2015



Dr. Clyde D. Leach

EXHIBIT B

From: Phillip J. Haberthur [mailto:philh@landerholm.com]
Sent: Thursday, February 04, 2016 12:47 PM
To: Matthew Segal
Cc: Heather A. Dumont; Bradley W. Andersen
Subject: RE: Esch Appeal

Matt,

I can confirm that we are seeking to withdraw assignment of error 1, issue 1, and argument section B, but as I indicated, we don't believe it's moot as we would like Dr. Leach to provide additional clarification regarding whether any documents were withheld for privilege, exemption, etc. If documents were withheld then we reserve the right to challenge the basis for the withholding. That includes any documents that Dr. Leach did not turn over to the PUD.

As I explained on the phone, the remainder of the appeal is not moot because Judge Altman ruled that Leach's constitutional rights, including the right to privacy, trumped the PRA. That ruling was erroneous. Unless Leach is prepared to stipulate to vacation of that order and entry of an order holding that his constitutional rights *do not* trump the PRA, then we need to resolve the issue on appeal. If you would like to propose something along those lines that includes a dismissal of Leach then we'd be willing to entertain such an approach. But as it stands, Judge Altman's ruling was in error and needs to be reversed or vacated.

I can include a section stating that we believe your brief should not be due until after the court rules on our motion. However, that may not matter to the Court. If you want to file a Motion for Extension of Time to be on the safe side then you may represent to the Court that we don't object.

Thanks,
Phil

EXHIBIT C

Court of Appeals No. 47831-5-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

SHERRY L. ESCH,

Appellant,

v.

SKAMANIA COUNTY PUBLIC UTILITY DISTRICT #1; and CLYDE D. LEACH,

Respondents.

APPELLANT'S MOTION TO FILE AMENDED BRIEF

PHILLIP J. HABERTHUR, WSBA No. 38038
LANDERHOLM, P.S.
805 Broadway Street, Suite 1000
P.O. Box 1086
Vancouver, WA 98666-1086
(360) 696-3312
Of Attorneys for Appellant

I. IDENTITY OF MOVING PARTY

Appellant Sherry L. Esch asks for the relief designated in Part II.

II. STATEMENT OF RELIEF SOUGHT

Leave of Court to file Appellant's Amended Opening Brief to remove the first assignment of error (enforcement of CR 2A settlement agreement) and the related issue and arguments. Appellant also wishes to modify portions of the remaining brief to reflect the abandonment of the first assignment of error.

III. FACTS RELEVANT TO MOTION

Appellant Sherry Esch filed her Opening Brief on November 5, 2015. As her first assignment of error, Esch claimed that the trial court failed to enforce the terms of a settlement agreement between Esch and the Respondent, Clyde Leach.

After Esch filed her Opening Brief, Leach substantially complied with at least portions of the settlement agreement, thereby rendering that issue moot on appeal. Specifically, Leach claims, by Declaration, to have searched the computers in his possession for public records and claims to have turned them over, together with a declaration describing his search efforts and results.

Esch therefore seeks to amend her Opening Brief to remove Assignment of Error #1, Issues Pertaining to Assignments of Error #1, and

Argument Section B. Esch will modify the other sections of the Brief to reflect removal of this argument.

IV. GROUNDS FOR RELIEF AND ARGUMENT

RAP 17(a) allows a party to seek relief by filing a motion with the Court. Good cause exists to grant Esch's Motion because the issues on appeal will be narrowed, the parties need not spend additional time and resources addressing an issue that can be removed, and the Court may simplify its review of the appeal, thus saving judicial resources.

Granting the relief requested will not render the remaining issues moot as the Court will need to review whether the Respondent had a legal right not to turn over the public records that were on his private computer or e-mail account. In other words, did Commissioner Leach's privacy rights trump the Public Records Act?

If Esch's Motion is granted, Appellant can file her Amended Opening Brief within ten (10) days of the Court's ruling. Appellant would also have no objection to allowing the Respondent to file their Response within the time set forth in RAP 10.2(b).

///

///

///

///

Finally, Esch requests that this Court stay the current due date for filing of Respondent's Brief until this Motion is decided by the Court as a ruling on this Motion may modify and simplify Respondent's Brief.

DATED this 4th day of February, 2016

LANDERHOLM, P.S.

/s/ Phillip Haberthur
PHILLIP J. HABERTHUR, WSBA #38038
Of Attorneys for Appellant Sherry L. Esch

CERTIFICATE OF SERVICE

The undersigned hereby certifies as follows:

1. My name is Heather A. Dumont. I am a citizen of the United States, over the age of eighteen (18) years, a resident of the State of Washington, and am not a party of this action.

2. On the 4th day of February, 2016, a copy of the foregoing **APPELLANT'S MOTION TO FILE AMENDED BRIEF** was delivered via first class United States Mail, postage prepaid, to the following:

Matthew J. Segal
Pacifica Law Group LLP
1191 Second Avenue
Suite 2000
Seattle, WA 98101-3404

Ramsey E. Ramerman
Ramerman Law Office, PLLC
218 Main Street, #319
Kirkland, WA 98033

Kenneth B. Woodrich
Woodrich & Archer LLP
P.O. Box 510
Stevenson, WA 98648-0510

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED: February 4, 2016

At: Vancouver, Washington

/s/ Heather Dumont
HEATHER A. DUMONT

COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION II

SHERRY L. ESCH, Appellant, v. SKAMANIA COUNTY PUBLIC UTILITY DISTRICT #1; and CLYDE D. LEACH, in his capacity as Public Utility District Commissioner, Respondents.	No. 47831-5-II PROOF OF SERVICE

On February 8, 2016, I caused a copy of the Response Brief of Skamania County PUD, Brief of Respondent Leach and Declaration of Matthew J. Segal in Support of Motion to Dismiss Appeal to be filed with the Court of Appeals and served upon counsel of record as indicated below:

ATTORNEYS FOR APPELLANT, ESCH

Bradley W. Andersen
Phillip J. Haberthur
LANDERHOLM, P.S.
805 Broadway Street, Suite 1000
PO Box 1086
Vancouver, WA 98666-1086

VIA EMAIL and US MAIL:
brad.andersen@landerholm.com
philh@landerholm.com

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2000
SEATTLE, WASHINGTON 98101-3404
TELEPHONE (206) 245.1700
FACSIMILE (206) 245 17500

ATTORNEYS FOR RESPONDENT SKAMANIA COUNTY PUBLIC UTILITY DISTRICT #1

Ramsey E. Ramerman
RAMERMAN LAW OFFICE, PLLC
218 Main Street, #319
Kirkland, WA 98033

VIA EMAIL:
ramseyramerman@gmail.com

Kenneth B. Woodrich
WOODRICH & ARCHER LLP
PO Box 510
Stevenson, WA 98648-0510

VIA EMAIL AND US MAIL:
ken@woodrich.com

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 8th day of February, 2016.

Katie Dillon

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2000
SEATTLE, WASHINGTON 98101-3404
TELEPHONE (206) 245 1700
FACSIMILE (206) 245 17500